IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CAROLYN MARIE McCULLOUGH[†] AKA CAROLYN M. STEWART, Appellant.	)	No. 55793-9-I **DIVISION ONE** UNPUBLISHED OPINION FILED: September 18, 2006

PER CURIAM – Carolyn Stewart appeals her convictions for violations of the Uniform Controlled Substances Act. She asserts that the trial court erred in finding that her waiver of jury trial was knowing, intelligent, and voluntary. She also objects to the trial court's admission of a statement Stewart alleges is hearsay. Stewart also contends that the evidence was insufficient to convict her and that her sentence constitutes cruel and unusual punishment. We affirm.

FACTS

[†] We note there are three different but similar spellings for McCullough in the record.

Carolyn Stewart was arrested and charged with three counts of Violation of the Uniform Controlled Substances Act: delivery of cocaine, involving a minor in a drug transaction, and possession of cocaine with intent to deliver. The charges all stemmed from a buy-bust incident on August 14, 2003, in Seattle's Belltown neighborhood. The incident involved Stewart and her then-17-year-old daughter N.S.

During a pre-trial evidentiary hearing, the State noted to the court that Stewart was heavily medicated and appeared to be having trouble staying awake and alert. The court instructed Stewart to talk with her doctor about taking medication that would not make her tired.

After the pre-trial hearings, Stewart waived in writing her right to a jury trial. The trial court then engaged in an oral colloquy with Stewart about waiver of that right, after which the court accepted the waiver as knowing, intelligent, and voluntary. The trial proceeded as a bench trial.

Three officers who had participated in or observed the transaction testified. Detective Don Waters was the undercover buyer. Waters testified he approached Bobby Flowers after he saw Flowers make a hand-to-hand exchange with another individual. Waters asked Flowers to "hook him up," and Flowers told Waters they would need to take the bus to Westlake Mall to get drugs. As the two waited at a bus stop, Stewart and N.S. walked toward them. Flowers went and talked to Stewart and N.S. Flowers then returned to Waters, told him they did not have to go to Westlake anymore, and instructed Waters to

follow him, Stewart, and N.S.

As they walked, Flowers asked Waters for the money, which Waters gave him. Waters saw Flowers quickly hand the money to N.S., who immediately handed it to Stewart. N.S. then reached backwards and handed something to Flowers. At one point during this transaction a police car drove by and Waters overheard N.S. say to Stewart "You're supposed to be watching my back."

Flowers returned to Waters and handed him what appeared to be crack cocaine. Waters then gave a signal to his arrest team, who arrested N.S. and Stewart. During the search of Stewart incident to her arrest, officers found the buy money. Officers searched N.S. at the police station and discovered in her underwear a small bag containing several rocks of crack cocaine. Officers tested the substance Flowers had handed to Waters and found that it contained crack cocaine.

Two other officers who observed the transaction testified. Officer James Rodgers watched the transaction from across the street, and his observations were generally consistent with those of Waters. However, he did testify that he saw a hand-to-hand transaction between Flowers and Stewart. Officer Daniel Espinoza was also observing, from south of the transaction. His observations were also generally consistent with those of Waters, but he testified that he saw Stewart hand something to Flowers.

Stewart told a different version. She testified that on the day of the incident, one of her other daughters told her that N.S. was selling drugs in

Belltown. As she was getting ready to go stop N.S., she received a call from her friend, Dan Faubert, whom she informed of the situation. Stewart testified that she took the bus to Belltown, argued with N.S., and walked away angrily. Soon after this, N.S. approached her and gave her money for a cab ride home. This was the money that the police found while searching Stewart. N.S. testified in support of Stewart's claim that Stewart was not involved in the drug transaction. Faubert testified to the phone conversation.

At trial, Stewart objected to the admissibility of N.S.'s statement "You're supposed to be watching my back," on the grounds that it was hearsay. The trial court overruled the objection, holding that the statement was not hearsay because it was not being offered for the truth of the matter asserted, and, further, because it appeared to be a statement of a co-conspirator.

The trial court convicted Stewart on all three counts and sentenced her within the standard range. Stewart appeals.

ANALYSIS

I. Waiver of Jury Trial

Stewart contends that the trial court erred in finding that she knowingly, intelligently, and voluntarily waived her right to jury trial. She asserts that the colloquy was inadequate because it did not address the effect of her medications.

A defendant's waiver of his or her constitutional right to a jury trial must be knowing, intelligent, and voluntary. Bellevue v. Acrey, 103 Wn.2d 203, 207, 691

P.2d 957 (1984). "Where a defendant is demonstrably aware of the constitutional right to a jury and has expressly waived that right in writing, the waiver will be effective." Acrey, 103 Wn.2d at 208. The State bears the burden of proving a valid waiver. State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

The State has met its burden to prove a valid waiver. Stewart expressly waived her right to a jury trial in writing. Stewart's counsel also expressed his opinion as to the validity of Stewart's waiver:

> I have done a bit of my own research and some very, very serious thinking about the decision and I have also talked with Ms. Stewart about it at length and I believe it's her decision at this point to go ahead and waive jury. I'd ask the Court to accept that waiver.

And, finally, the trial court engaged in the following colloquy with Stewart:

> THE COURT: Ms. Stewart, you understand that you have an absolute right to a jury trial?
> THE DEFENDANT: Yes, sir, I do.
> THE COURT: [Your attorney] discussed that with you?
> THE DEFENDANT: Yes, sir, he did.
> THE COURT: You understand you have a right to waive a jury trial and have the case tried to the Court and have a judge make the decision?
> THE DEFENDANT: Yes, sir, I do.
> THE COURT: And you understand if you do that, that even though if, as an example, if I find you guilty, you have a right to appeal that decision? That is, you can appeal claiming that I made an error in making that finding, but you cannot appeal on the basis that you were denied a jury trial. Do you understand that?
> THE DEFENDANT: Yes, sir.
> THE COURT: So if you waived your right to a jury trial you cannot later claim that you should have had a jury trial. Do you understand that?
> THE DEFENDANT: Yes, sir.
> THE COURT: But you would still have the right to appeal the decision of the Court regarding the question of guilt or innocence as the case may be. Do you understand that?

> THE DEFENDANT: Yes, sir.
> THE COURT: Is it your desire to waive a jury and to have the case tried by me?
> THE DEFENDANT: Yes, sir.
> THE COURT: Okay. I am satisfied that Ms. Stewart is making a knowing, intelligent and voluntary waiver and I'll accept the waiver of jury trial at this time.

This evidence shows a valid waiver.

Stewart claims that the waiver was inadequate because the trial court failed to ask her any questions about whether she was taking any medications and, if so, whether those medications were affecting her competency. She cites an incident that occurred 26 days earlier, in which the State commented to the trial court that Stewart seemed heavily medicated and was having problems staying awake, and Stewart's counsel suggested that the problem was due to the various medications Stewart was taking. The court acknowledged that Stewart had been slumping, but that she had also seemed responsive. The court asked Stewart to consult her doctor about putting her on medications that did not affect her ability to stay awake. Stewart also notes that before the colloquy, the State requested the court ask Stewart questions about her medication, and the court did not do so.

These concerns do not render Stewart's waiver inadequate. The record does not reflect that any issues arose regarding Stewart's ability to be alert and awake after the trial court asked Stewart to consult with her doctor about her medications.[1] Further, the court had an opportunity to ask Stewart questions

[1] If anything, the record appears to indicate that the issue was resolved after that. Five days after the initial alertness incident, the court asked defense counsel about Stewart's alertness, and

during the colloquy and observe her demeanor. The court was not required to specifically ask about the effect of Stewart's medications, particularly if it could observe her level of alertness itself. The waiver was adequate.

II. N.S.'s Statement

Stewart argues that N.S.'s statement "You're supposed to be watching my back" was improperly admitted. She claims that the statement was hearsay, and that there was no applicable exception. She also asserts that the statement cannot come in under the co-conspirator hearsay exception because the trial court made no formal finding of a conspiracy and because there was insufficient evidence of a conspiracy.

A. Implied Assertion

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. ER 801(c), 802. We review a trial court's ruling on the admissibility of evidence for abuse of discretion. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107, 864 P.2d 937 (1994). The State argues that the statement was not being offered to prove the truth of the matter asserted, but rather to show N.S.'s "personal belief of her mother's role, regardless of its accuracy." But Stewart claims it is being offered to prove the truth of the matter asserted, citing State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997).

The trial court did not abuse its discretion in admitting the statement. The

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counsel said that Stewart seemed much more alert than at previous hearings.

evidence was not admitted to show that Stewart was, in fact, supposed to be watching N.S.'s back. Rather, it was admitted to show N.S.'s implied belief of same. An analogous case that the trial court cited is State v. Collins, 76 Wn. App. 496, 886 P.2d 243 (1995). In Collins, the State sought to introduce evidence of phone calls to an apartment the police were searching for drugs. The police answered the calls, and the callers stated they wanted to "pick up something" or needed drugs. Collins, 76 Wn. App. at 497-98. The reviewing court upheld the trial court's admission of the phone calls, holding:

> The truth of the callers' statements, that they really did need or want something, was not at issue. However, implicit in the callers' statements is the belief that they could get the drugs they sought through [the defendant] or at the apartment. This implied belief provides the evidentiary value of the statements.

Collins, 76 Wn. App. at 499. Likewise, here N.S.'s implied belief provided the evidentiary value of the statements.

Stewart argues that Stenson is analogous. In Stenson, the defendant offered into evidence messages on his answering machine from a caller asking the defendant when he intended to come to Texas. Stenson, 132 Wn.2d at 709-10. The defendant claimed the calls were admissible to show his intent to go to Texas. Stenson, 132 Wn.2d at 709-10. The State objected, claiming the messages were being offered to prove the truth of the matter asserted. Stenson, 132 Wn.2d at 709-10. The reviewing court agreed with the State and affirmed the trial court's refusal to admit the evidence. Stenson, 132 Wn.2d at 711-12. The Stenson court distinguished Collins, noting that the phone messages in

Collins were not hearsay because they showed "the implied belief of the callers that they could get drugs at that apartment, which supplied the evidentiary value of the statements." Stenson, 132 Wn.2d at 711.

Although Stenson does bear some similarity to the instant case, given Collins and the fact that the standard of review is abuse of discretion, we cannot say that the trial court erred in admitting the statement as non-hearsay. Stewart's challenge fails.

B. Statement of a Co-Conspirator

However, even if N.S.'s statement was not admissible under the above analysis, it was admissible as a statement made by a co-conspirator during the course of and in furtherance of a conspiracy. ER 801(d)(2)(v). Such a statement is not hearsay. Before the statement can be admitted, however, the State must first establish a prima facie case of conspiracy, requiring evidence that supports a logical and reasonable deduction that conspiracy occurred. State v. Barnes, 85 Wn. App. 638, 663, 932 P.2d 669 (1997). A conspiracy occurs when a person, with intent that conduct constituting a crime be performed, agrees with one or more persons to engage in such conduct, and any one of them takes a substantial step in pursuance of such agreement. RCW 9A.28.040(1). A formal agreement is unnecessary, and a conspiracy may be shown by the acts and conduct of the conspirators. Barnes, 85 Wn. App. at 664.

There was substantial evidence in the record of conspiracy. Officers saw Stewart and N.S. walking when Flowers made contact with them. Flowers spoke

briefly with Stewart and N.S. After walking behind the two women, Flowers handed the money to N.S., who immediately handed it to Stewart.[2] Then N.S. handed the drugs to Flowers. This evidence supports a prima facie case that N.S. and Stewart intended and agreed to sell drugs, and took substantial steps in pursuance of that agreement.

Further, the statement was in furtherance of a conspiracy. Courts generally interpret the "in furtherance of" requirement broadly. State v. Baruso, 72 Wn. App. 603, 615, 865 P.2d 512 (1993). A statement meant to induce further participation in the conspiracy is sufficient. State v. King, 113 Wn. App. 243, 280, 54 P.3d 1218 (2002). N.S.'s statement was meant to induce Stewart's further participation in the drug transaction, by reminding Stewart of her role of lookout. Thus, N.S.'s statement can come in as a statement of a co-conspirator.

Stewart argues that the statement cannot come in as a statement of a co-conspirator because the trial court did not make a formal finding that there was a conspiracy. Although the trial court should make an independent determination by the preponderance of the evidence that there was a conspiracy, a hearsay statement can still be admitted as a statement of a co-conspirator if there is substantial evidence in the record of a conspiracy. See State v. Guloy, 104 Wn.2d 412, 420-21, 705 P.2d 1182 (1985). Because there was substantial evidence of a conspiracy, Stewart's claim fails.

[2] Two of the officers testified that they observed a hand-to-hand exchange between Flowers and Stewart. But this version of the facts also supports a prima facie case of conspiracy, as these officers also testified that N.S. and Stewart were walking together both during and after the transaction, and one saw N.S. hand something to Stewart during the transaction.

III. Sufficiency of the Evidence

Stewart claims that, in the absence of N.S.'s impermissible hearsay statement, there was insufficient evidence to convict her of the charged offenses. She argues that the testimony of the State's witnesses was internally inconsistent. Evidence is sufficient if, viewing it in the light most favorable to the State, any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996).

The evidence was sufficient to convict Stewart of delivering cocaine. A person is liable as an accomplice if he or she knowingly encourages or aids another in the commission of the charged offense. RCW 9A.08.020(3)(a). Here, after Flowers handed the money to N.S., N.S. handed it to Stewart. Then N.S. handed the drugs to Flowers. N.S. believed that Stewart was supposed to act as a lookout. As discussed, N.S.'s statement was admissible. This evidence supports a finding beyond a reasonable doubt that Stewart aided and encouraged N.S. in delivering cocaine.

Stewart claims that the evidence was insufficient because the testimony of the three officers was inconsistent. Waters testified that he saw Flowers hand the money to N.S., N.S. hand the money to Stewart, and N.S. hand the drugs to Flowers. Espinoza testified: "After I saw the younger female hand something to the defendant, she turned and gave it to the male Flowers." And Rodgers testified that he observed a hand-to-hand exchange between Flowers and

Stewart. The trial court found that, other than these inconsistencies, the accounts of the three officers were generally consistent. Viewing the evidence in the light most favorable to the State, these inconsistencies are not so significant that they cast doubt on the officers' entire testimony, and, in any event, all of the accounts are sufficient to support a conviction for delivery.

The evidence was also sufficient to convict Stewart of involving a minor in a drug transaction. Stewart and N.S. spoke with Flowers together, and both took part in the drug transaction. A defendant involves a minor in a drug transaction if he or she allows a minor to remain during a drug transaction. State v. Hollis, 93 Wn. App. 804, 812, 970 P.2d 813 (1999). As N.S. not only remained during the transaction, but in fact directly participated with no protest from Stewart, the evidence is sufficient for conviction.

Finally, the evidence was sufficient to convict Stewart of possession of cocaine with intent to deliver. Possession with intent to deliver can be inferred from possession of a large quantity of a controlled substance, with some additional indicator of intent present. State v. Campos, 100 Wn. App. 218, 222-23, 998 P.2d 893 (2000). "Where . . . the evidence shows possession of a quantity greater than that delivered, that same evidence indicates an independent objective to make other deliveries." State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990) (quoting State v. Burns, 53 Wn. App. 849, 853, 770 P.2d 1054 (1989)). Thus, a rational trier of fact could find that because N.S. had just delivered cocaine and still had some on her person, she intended to deliver

the remaining cocaine. The trier of fact could also find that Stewart intended to continue to act as N.S.'s accomplice in the drug transactions. Stewart's sufficiency arguments fail.

IV. Additional Grounds

Stewart raises two additional issues in her pro se brief. Her first argument appears to be a challenge to the sufficiency of the evidence, as she cites the conflicting statements of the police officers, the fact that N.S. wrote a statement on her behalf, and the fact that the trial court convicted her despite stating it believed her witnesses. As noted above, the evidence was sufficient to convict Stewart of the charged offenses. The trial court specifically found that although there were some inconsistencies in the officers' testimony, they all saw N.S. and Stewart together throughout. The trial court also found that the inconsistencies between Stewart's and N.S.'s statements were greater than those between the statements of the officers, and specifically found Stewart's and N.S.'s testimony not to be credible in certain respects. And while the trial court found no reason to disbelieve Faubert, it found Faubert's testimony not necessarily inconsistent with what the officers saw. The evidence was sufficient.

Stewart also claims her sentence was excessive and constituted cruel and unusual punishment, given her health problems. The test for cruel and unusual punishment "is whether, in view of contemporary standards of elemental decency, the punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness."

State v. Gibson, 16 Wn. App. 119, 125, 553 P.2d 131 (1976).

Stewart's sentence is not cruel and unusual simply because she is ill. Her argument is akin to that of the juvenile defendant in State v. Massey, 60 Wn. App. 131, 145-46, 803 P.2d 340 (1990). Massey was convicted of first degree aggravated murder and argued that his sentence of life imprisonment without the possibility of parole constituted cruel and unusual punishment as applied to a 13-year-old. Massey, 60 Wn. App. at 145. The court disagreed, noting that the test for cruel and unusual punishment "does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed. Therefore, there is no cause to create a distinction between a juvenile and an adult who are sentenced to life without parole for first degree aggravated murder." Massey, 60 Wn. App. at 145. Likewise, the test for cruel and unusual punishment does not embody a consideration of the defendant's physical health, or, indeed, any other individual characteristics particular to the defendant. Stewart was sentenced within the standard range on all counts. She has not argued or shown that her standard range sentence is of such disproportionate character to her offense as to shock the general conscience and violate principles of fundamental fairness. Her punishment was thus not cruel and unusual.

We affirm.

FOR THE COURT:

Appelwick, C.J.

Baker, J.

Schindler, ACJ